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ORDER No. 50 OF THE DIRECTOR GENERAL OF RAILROADS.

When the Director General of Railroads issued General Order No. 50, he probably had no idea of the legal problems which would be created by his order. The case of Vaughn v. The State, printed in full in this issue, shows the problems likely to arise from a strict adherence to the terms of this order.

Two of our recent contributors, Hon. Henry C. Clark of Jacksonville, Fla. (88 Cent. L. J. 100), and Hon. Edgar Watkins of Atlanta, Ga. (88 Cent. L. J. 157), took opposite views with respect to the validity of this celebrated order, the former contending that it was valid as an administrative order in relation to a matter of legislation where Congress had conferred the power upon the Director General to supplement and apply an Act of Congress by general orders; while the latter contended that Congress, by the act of March 21, 1918, made this particular order impossible by reason of the provision therein that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law." Mr. Watkins made an argument, difficult to meet, when he called attention to the fact that this provision of the act is not subject, as some of the other provisions are, to the exception that it is operative only so far as it is not inconsistent with any order of the President. In other words, as Mr. Watkins contended, Congress did not confer, even if it had the power so to do, any authority on the President to affect any rights of action at law or in equity which might properly be brought against a carrier.

The recent federal decisions generally sustain the general orders affecting suits against railroads. Thus, Order No. 18, fixing venue, was approved in Wainright v. Railroad, 253 Fed. 459; Cocker v. Railroad, 253 Fed. 676. So also it has been held that Order No. 26, giving the court power to defer trial of suits against railroads is valid. Harnick v. Railroad, 254 Fed. 748.

General Order No. 50 has recently been held valid by Munger J. in Rutherford v. Union Pacific Railroad Company, 254 Fed. 880, where the court sustained defendant's motion to dismiss an action for personal injuries as to the company, and permitted the substitution as defendant of the Director General of Railroads. Judge Munger considered the argument of Mr. Watkins, just referred to, and answered it in the following manner:

"The plaintiff claims that by the terms of section 10 of the act of Congress approved March 21, 1918, 'actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law,' and therefore he is entitled to bring and maintain his action and to prosecute it to judgment against the railroad company named as defendant, and that the order of the Director General is not effective, because it is violative of this provision of the statute.

"From and after the taking possession of the railroads by the President, the corporations or persons who had previously controlled them ceased their functions and obligations as carriers. While goods and passengers continued to be carried, the carriage was conducted by the Director General. The acts of the former officers and employes, who retained their positions and conducted the details of operation were the acts of the Director General. The part of section 10 of the act of March 21, 1918, on which the plaintiff relies, did not provide that actions at law might be brought by and against the railway corporations, but did provide that they might be brought against 'such carriers,' and this referred to the 'carriers while under federal control' mentioned in the first part of the section. It would have been an anomaly to have given the actual control of the railroads to the Director Gen-

eral, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested of authority over those acts.

"Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and passengers transported (United States v. Nixon, 235 U. S. 231, 234, 35 Sup. Ct. 49, 59 L. Ed. 207; United States v. Ramsey, 197 Fed. 144, 146, 116 C. C. A. 568, 42 L. R. A. [N. S.] 1031), and the office of the Director General is analogous to that of a receiver of the railway companies."

To our mind it is rather a severe strain on the language of section 10 of the act of March 21, 1918, to define "carriers" to mean the Director General. All the orders issued by the Director General presume as a fact not only the continued existence of the corporations owning the roads, but their authority as such to contract, to sue and to act in every way, except as provided by order, under the authority of their own rules and regulations and under the control of their officers and directors. If Congress had intended by the word "carriers" to mean the Director General of Railroads, it would have been a simple matter to say so. The word is plural in the act, but under Judge Munger's construction it is necessarily singular, as according to Judge Munger, there is today only one "carrier," and he is the Director General.

There is likely to be great uncertainty as to the effect of judgments rendered against the Director General. If the railroads are turned back to their owners, as now seems certain, the railroad companies will claim to be discharged of all such liabilities. It is not fair to litigants to put them in the position of suing their own governments for acts which are only technically chargeable to the Director General, and for which the companies should be liable, and for which we believe Congress intended them to remain liable.

NOTES OF IMPORTANT DECISIONS.

DOES AN INVALID ORDINANCE FIXING RATES GRANT AN EXTENSION OF A FRANCHISE?—The novel doctrine announced by the Supreme Court in Denver Union Water Company Case, 246 U. S. 178, is strictly adhered to in the recent case of Detroit United Railway Co. v. City of Detroit, 39 Sup Ct. Rep. 156.

In the Detroit United Railway Company's case the plaintiff sought to enjoin the defendant from enforcing an ordinance providing that "no street railway *operating without a franchise* shall charge more than five cents for a single ride." The reason for this ordinance was to force the plaintiff company to accept a renewal of certain franchises which had expired on terms which were objectionable to the company. The plaintiff having rejected the proposed renewal franchise, was no longer entitled to use the streets covered by franchises which had expired. It was also admitted by the court that the city had the right to tear up the tracks on such streets. Instead of doing this, however, the city passed the ordinance providing for the operation of street railways "operating without a franchise" and regulating the fares to be charged. The Supreme Court, following the Denver Union Water Company Case, held that this ordinance was an implied grant, authorizing the plaintiff to continue to operate its lines for the public benefit, but that the ordinance was void in requiring the company to operate such lines at a financial loss. On this point Justice Day, writing the opinion of the court, said:

"A principal ground upon which the bill was dismissed by the district court was the view of the learned judge that the power to compel the company to remove its tracks from the streets involving the non-franchise roads included the right to fix terms of continued operation upon such lines, whether remunerative or not. We cannot agree with this view. In our opinion the case in this respect is ruled in principle by Denver v. Denver Union Water Co., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649. In that case the franchise of a water company had expired, and the city might have refused the further use of the streets to the company. Instead of doing this it passed an ordinance fixing rates and requiring certain duties of the company. We held that in that situation the company was entitled to make a reasonable return upon its investment. So here, the city might have required the company to cease its service and remove its tracks from the non-franchise lines within the city. Instead of taking this course the city enacted an ordinance for the continued operation of the company's

system, with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not. This action contemplated the further operation of the system, and fixed penalties for violations of the ordinance. By its terms the ordinance is to continue in force for the period of one year, unless sooner amended or repealed. This was a clear recognition that until the city repealed the ordinance the public service should continue, with the use of the streets essential to carry on further service. Within the principles of the Denver case this service could not be required without giving to the company, thus affording it, a reasonable return upon its investment."

The basis for the apparently illogical ruling of the court in the Denver Union Water Company case, is the public interest, which would otherwise be seriously affected by any abrupt interference with the operation of the quasi public service rendered by the company authorized to perform such services under a franchise which has expired. In the Denver case, the court dwelt on the fact that if the water company were compelled to cease operations, even for one day, it would result in untold handicaps and danger to the public. On the other hand, it is difficult to see how the rule announced by the court can be sustained on any principle of law or justice which keeps in view the rights of the city in such a situation, and this idea is expressed by Justice Clark (Holmes and Brandeis concurring), who, in referring to the Denver Union Water Company Case, said:

"The application of the principle of that case to this one must result in depriving the city of the power to treat with the company for terms for the operation of the tracks which it owns in the streets in which its franchises have expired and in which this court has decided it has no rights whatever, except upon terms as favorable to the company as it would be entitled to if it had a valid and continuing grant to operate in them. The utmost that can be claimed for the ordinance is that it suffers the company to use streets which it could not use at all without it—for the company to use them in any other way than as thus permitted would be unlawful. Yet this mere offer of this naked privilege, in terms revocable at will, and rejected by the company, is held to give a constitutional right and at the same time to so violate that right as to render the ordinance invalid. I cannot bring myself to understand how, except by sheer assertion of power, even the apparent justice of the result which it is hoped thus to obtain can be made the basis for creating a constitutional right where no right whatever existed before the passing of this rejected ordinance."

Under the rule announced by the Supreme Court it would seem that a franchise once granted shall practically continue in force indefinitely unless the city undertakes actively to interfere with the operation of the franchises by violent means. It does not appear that a city can even offer the former holder of the franchise the alternative to continue under terms prescribed or cease to operate. On this point the language of Justice Holmes in the Denver Union Water Case is interesting. The learned judge said:

"We must assume that the Water Company may be required, within a reasonable time, to remove its pipes from the streets. Detroit United Railway v. Detroit, 229 U. S. 39, 46 [33 Sup. Ct. 697, 57 L. Ed. 1056]. * * * In view of that right of the city, which, if exercised, would make the company's whole plant valueless as such, the question recurs whether the fixing of any rate by the city could be said to confiscate property on the ground that the return was too low. * * * The ordinance of the city could mean no more than that the company must accept the city's rates or stop—and as it could be stopped by the city out and out, the general principle is that it could be stopped unless a certain price should be paid."

PART PAYMENT OF JUDGMENT DOES NOT TOLL THE STATUTE OF LIMITATIONS.—Some age-long problems of the law are being settled and settled right. How many of the older lawyers remember the arguments in classroom over the question whether a judgment was a contract or not? Those were the good old days when close distinctions were made and sometimes the heart of the problem neglected. If a judgment is a contract it must be subject to all the rules relating to contract. One of these rules is that a part payment on a contract obligation will toll the Statute of Limitations so that it commences to run again from the time of the part payment. This rule it was sought to apply to the case of a part payment of a judgment in Garabedian v. Anadesian, 105 Atl. 516.

In this case the action was for a judgment debt over twenty years old. To defendant's plea of the Statute of Limitations the plaintiff set up the fact that on different occasions during the twenty years defendant had paid to him small sums of money in part payment of the judgment and contended that the Statute of Limitations began to run from the date of the last payment. To this contention the Supreme Court of Rhode Island would not agree on the ground that a judgment was in no proper sense a contract and that therefore the rules applying to contracts with respect to the tolling the Statute of Limitations, did not apply.

It is important to note that when the obligation of a contract is merged in a judgment, the contract obligation can never thereafter be revived. Berkson v. Cox, 73 Miss. 339; Brown v. West, 73 Me. 23; United States v.

Leffler, 11 Pet. (U. S.) 86. If this be true no part payment on, or acknowledgment of the judgment will have the effect of reviving the old obligation under the contract.

A judgment is not a contract. As Lord Mansfield said in Bidleson v. Whytel, 3 Burrows 1545, *judicium redditur in invitum.* An obligation imposed by statute or by the judgment of a court wants all the elements of a contract. There is no *aggregatio mentium;* there is no consideration. The idea that a judgment is a contract was a fiction of the common law pleaders, who, in classifying actions upon judgments, assumed a promise to pay on the part of the judgment debtor and allowed the action to be brought *in assumpsit.* In the same category is the fictitious promise of a husband to pay for necessaries furnished his wife against his express prohibition. The form of action on a judgment may be *ex-contractu* but the judgment itself is not a contract. O'Brien v. Young, 95 N. Y. 428; Louisiana v. New Orleans, 109 N. S. 285; Smith v. Harrison, 33 Ala. 706; Rae v. Hulbert, 17 Ill. 572; Larrabee v. Baldwin, 35 Cal. 156.

The particular question whether a judgment is a contract and as such capable of being postponed as to its obligation by part payment or a new promise was answered in the negative after full consideration, in the cases of Olson v. Dahl, 99 Minn. 433, and Morley v. Railway Co., 146 U. S. 162.

REMOVAL OF SUITS FROM STATE TO UNITED STATES COURTS—A PICTURE OF CHAOS DEMANDING A REMEDY

To a reflective observer of the actual working of our judicial institutions, there is no more astounding condition than that which marks the actual administration of our removal statutes.[1] Smith McPherson, D. J., in 202 Fed. 771, 773, said:

"That there is no other phase of American jurisprudence with so many refinements and subtleties as relate to removal proceedings, is known by all who have to deal with them."

Theoretically a uniform statute should be uniformly construed and uniformly administered throughout the territory in which it is operative and during the period of its operation. In the administration of the present removal law, however, we find exactly the opposite—there is a variety of construction and of application, both in time and place, which is amazing, and a persistency of contrariety which is a peculiar illustration of an "independent"[2] judiciary. What is lawful in the Eighth Circuit[2a] or Rhode Island[3], Georgia[4], or Massachusetts[5], Nevada[6], South Carolina[7], Iowa[8], Alabama[9], Texas[10], California[11] or Kentucky[12], is unlawful in the Second Circuit including New York[13], or in West Virginia[14], Tennessee[15] and Ohio[16]; what is permitted in one district of New York[17] is denied in another[18]; what is allowed at one time[19] is refused at another in the same

(1) Judicial Code, U. S. Secs. 28-35.

(2) See Mahopoulos v. Chicago R. I. & P. Ry. Co., 167 Fed. R. 165, 172 (W. D. Mo.).

(2a) Memphis Sav. Bk. v. Houchens, 115 Fed. R. 96.

(3) Amsinck v. Balderston, 41 Fed. 641.

(4) Rome Etc., Co., v. Hughes Etc., Co., 130 Fed. 585.

(5) Pepper v. Rogers, 128 Fed. R. 987.

(6) Burch v. So. Pac. Co., 139 Fed. R. 350.

(7) Robert v. Pineland Club, 139 Fed. R. 1001.

(8) Iowa, Etc., Co., v. Bliss, 144 Fed. R. 446.

(9) Hohenberg v. Mobile Lines, 245 Fed. R. 169.

(10) James v. Amarillo, Etc., Co., 251 Fed. 337 (W. D. Tex.).

(11) Bagenas v. So. Pac. Co., 180 Fed. 887 (N. D. Cal.).

(12) Whitworth v. R. R. Co., 107 Fed. 557; Louisville & N. R. Co. v. W. U. Tel. Co., 218 Fed. 91.

(13) Guaranty Tr. Co. v. McCabe, 250 Fed. 699 (2nd Cir.); Metropolitan Petroleum Corp. v. Levering (S. D. N. Y.) not yet reported.

(14) Foulk v. Gray, 120 Fed. R. 156, citing nine cases in support and fifteen cases in opposition to the conclusion. Wilbur v. Red Jacket, Etc., Co., 153 Fed. 662; Gillespie v. Pocahontas, Etc., Co., 162 Fed. 742.

(15) Western Union Tel. Co. v. L. & N. R. Co., 201 Fed. 932.

(16) Keating v. Pennsylvania Co., 245 Fed. 155.

(17) Manufacturers, Etc., Co., v. Brown, Etc., Co., 148 Fed. 308; Cincinnati, Etc., Ry. v. Orr, 215 Fed. 261 (E. D. N. Y., removal by assignee of non-resident assignor); Stimson v. United Paper Co. (N. D. N. Y.), 156 Fed. 298.

(18) See illustration in Notes 21, 22.

(19) Manufacturers, Etc., Co., v. Brown, Etc., Co., 148 Fed. 308.

district or circuit[20]; what is not persuasive to the reason of a judge, he enforces for the sake of conformity[21], though in the same court, before another judge, and about the same time, but upon a line of other precedents in the same district, conformity is assumed to demand the opposite disposition[22]; the judge who disregards his intellectual convictions for the sake of conformity in one case and court, in another case and court[23] dissents when his colleagues overrule him for the sake of the same conformity, though they reverse another judge in order to do so; and the highest court of all now reviews[24] and now refuses to review[25], first creating the basis of the confusion[26] and then declining to bother with the matter at all[27], at least by any short course[28]; two judges of the highest court, when siting at Circuit, each reach contrary conclusions in successive suits[29], and the Chief Justice consistently adheres to reasoning which fails to convert his colleagues, so that while he writes for the court in one case[30], he is a minority of one in the next, through his persevering consistency[31]; the Supreme Court itself robs its leading decision of all of the force of its reasoning by reaching opposite conclusions upon its main point[32], without specifically overruling it; it also makes the opposite disposition, but without opinion in the next case[33] upon the same point, and subsequently denies relief upon the authority of the case without opinion[34], though the opinion in the leading case would demand the relief denied, and yet all the while it fails or refuses to treat the leading cas as wholly overrruled, and, with full knowledge of the confusion and inconsistency, embraces no opportunity to give a definite construction.

In the whole field of judicial administration I know no confusion resembling it; and in the whole field of physical analogy nothing like it except the ever-changing aspects through a kaleidoscope. One is at once prompted to ask, what is the trouble and why is it not remedied? The answer itself is complex. Lamentable indifference somewhere is the reason it is not forcibly remedied. Lack of systematic judicial organization and effort is the reason it is not judicially remedied. Lack of studied presentation seems the reason there is no overwhelming demand that it should be remedied.

(20) cf. Foulk v. Gray, 120 Fed. R. 156 (W. Va., Keller, J.), and Wirgman v. Persons, 126 Fed. R. 449 (4th Cir., Keller, J., participating).

(21) Doherty v. Smith, 233 Fed. 132 (S. D. N. Y.); Jackson v. William Kenefick, 233 Fed. 130, 131 (S. D. N. Y.).

(22) See comment upon differences of view in So. D. of N. Y., McCabe v. Guaranty Trust Co., 243 Fed. R. 845, 847 (2nd Cir.), and the contrary result reached by the same court in Guaranty Tr. Co. v. McCabe, 250 Fed. 699, thus settling by a majority and over a dissent the practice in the 2nd Circuit, but contrary to the reasoning of many of its judges.

(23) McCabe v. Guaranty Trust Co., 250 Fed. 699 (2nd Cir.)—cf. cases in note 21 above.

(24) In re Wisner, 203 U. S. 440; In re Moore, 209 U. S. 491; Cochran v. Montgomery Co., 199 U. S. 260.

(25) Ex Parte Harding, 219 U. S. 363.

(26) cf. Barney v. Latham, 103 U. S. 205, where a non-resident defendant removed against a non-resident plaintiff's objection, with In re Wisner, 203 U. S. 449, where it was held that the court had no jurisdiction in removed suits between two non-residents of the district, and In re Moore, 209 U. S. 491, where it was held that consent could confer the jurisdiction though neither party was a resident of the district; and Kreigh v. Westinghouse, Etc., Co., 214 U. S. 249, to same effect; see Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 542, 549 (2nd Cir.); Sagara v. Chicago, Etc., Ry. Co., 189 Fed. R. 220; In re Tobin, 214 U. S. 506; Ex Parte Nicola, 218 U. S. 668; Ex Parte Harding, 219 U. S. 363. See Bagenas v. So. Pac. Co., 180 Fed. R. 887 (N. D. Cal.).

(27) Guaranty Trust Co. v. McCabe, 250 Fed. 699; certiorari refused 39 Supr. Ct. R. 427; Ex parte Harding, 219 U. S. 363.

(28) Ex parte Park Sq. Automobile Station, 244 U. S. 412.

(29) Field, J., in County of Yuba, v. Pioneer M. Co., 32 Fed. R. 183, and in Wilson v. Western U. Tel. Co., 34 Fed. R. 561; Brewer, J., in Harold v. M. Co., 33 Fed. R. 529, and as stated in Burch v. So. Pac. Co., 139 Fed. R. 350, at p. 35, and in Iowa, Etc., Co., v. Bliss, 144 Fed. R. 446.

(30) In re Wisner, 203 U. S. 449.

(31) In re Moore, 209 U. S. 491.

(32) In re Moore, 209 U. S. 491; Matter of Tobin, Matter of Kristianson, 214 U. S. 506; see Bagenas v. So. Pac. Co., 180 Fed. 887 (N. D. Cal.).

(33) Ex parte Tobin, Matter of Kristianson, 214 U. S. 506.

(34) Matter of Nicola, 218 U. S. 668.

The trouble lies both with the legislature and the judiciary. Congress obscured[35] what might easily have been made plain, and it made the possibility of review of inconsistent administration difficult.[36] What Congress had begun, the judiciary completed by erroneous or inconsistent reasoning, too closely following the rule *stare decisis*[37] where it was not necessarily operative,[38] paying too little regard to the evolution of the law and too much insisting upon freedom of independent judgment[39] where it made for confusion, and on the whole with too little team work.

The confusion is now so great that even if there were an authoritative decision from the Supreme Court of the United States, whichever way it went, it would fail to satisfy the adverse reasoning, and if it should seek to preserve the force of various precedents, it would, it seems to me, without doubt modify or nullify the purpose of Congress.

The present confusion appears to have arisen from the disregard of fundamental principles, which should be of primary weight in construction,[40] the disregard of historical evolution as a means of elucidation, the misapplication of a supposed purpose of Congress to curtail the jurisdiction of United States Courts, the misapplication to removed cases of principles which probably apply only to suits instituted in the United States Courts,[41] the adoption of a phrase to represent a principle,[42] and its subsequent undue extension to situations in which the principle does not apply,[43] the misinterpretation of the purpose of Congress as conferring a right of veto upon a plaintiff in a removal case,[44] and the hopeless and misleading effort to conform to the principles of a decision of the Supreme Court of the United States[45] which stands alone, discredited,[46] criticised,[47] distin-

(35) By the Judiciary Act of 1887-8, and the Judicial Code.

(36) See Note 50.

(37) Doherty v. Smith, 233 Fed. 132, 133 (S. D. N. Y.).

(38) See striking illustrations of the disregard of the rule stare decisis collated by Julius Henry Cohen, Esq., in "Commercial Arbitration and the Law," Chap. IV., e. g. Hertz v. Woodman, 218 U. S. 205, 212; Genesee Chief v. Fitzhugh, 12 How. 443.

(39) See Mahopoulos v. Chicago R. I. & P. Ry. Co., 167 Fed. 165, 172 (W. D. Mo.).

(40) The extent of the judicial power in the Constitution, to be availed of by a defendant if he desires, should be the primary rule in determining the intent of Congress. (Const. U. S., Art. III, ss. 1, 2; Art. I, s. 8; Art VI.) See as to removal being a constitutional right, Barney v. Latham, 103 U. S. 205, 210, 212.

(41) Louisville & N. R. Co. v. West U. Tel. Co., 218 Fed. 91, 97, 100 (E. D. Ky.); James v. Amarillo City, Etc., Co., 251 Fed. 337 (N. D. Tex.).

(42) "No suit which could not have been originally brought in the Circuit Court of the United States can be removed therein from the State Court," In re Wisner, 203 U. S. 449, p. 457: "And it is settled that no suit is removable under section 2" (1, 2 of the Act of 1887) "unless it be one that plaintiff could have brought originally in the circuit court." This is true perhaps, but it does not determine that it cannot be removed to a Federal court in a district in which it could not have been originally brought. See Louisville & N. R. Co. v. West. U. Tel. Co., 218 Fed. R. 91, 102 (E. D. Ky.), where Cochran, D. J., points out (p. 109) the origin of the expression that a suit cannot be removed from a state court unless it could originally have been brought in the circuit court of the United States, and shows that the rule referred to relates to the character of the suit to be removed and not to the place of removal. He adds (p. 109): "They do not settle that it is not removable if, though it is such in point of character, it could not have been brought originally in the Circuit Court of the United States, to which it is sought to be removed, because the district within which it was brought was not the district in which it was required to be brought, if brought in that court. Nor do they in their tendency support such a position. The statement, therefore, is inaccurate, and if one is not on his guard, calculated to mislead him. It is not a true generalization of those cases, in that it is too wide. A true generalization thereof would be that no suit can be removed that is not of the character described in the first section, and for this reason could not have been brought originally in the Federal court."

(43) Louisville & N. R. Co. v. Western U. Tel. Co., 218 Fed. 91, 92.

(44) e. g. Foulk v. Gray, 120 Fed. 156, and similar cases, criticised in Pepper v. Rogers (Mass), 128 Fed. 987; Rome, Etc., Co., v. Hughes, Etc., Co., 130 Fed. 585 (N. D. Ga.); Burch v. So. Pac. Co., 139 Fed. 350 (Nev.); Robert v. Pineland Co., 139 Fed. 1001; Iowa, Etc., Co., v. Bliss, 144 Fed. 446 (Iowa); and James v. Amarillo City, Etc., Co., 251 Fed. 337, 343.

(45) In re Wisner, 203 U. S. 449.

(46) Ex parte Harding, 219 U. S. 363; Louisville & N. R. Co. v. Western U. Tel. Co., 218 Fed. 91 (E. D. Ky.); Ex parte Park Sq. Automobile Station, 244 U. S. 412, 416; James v. Amarillo, Etc., Co., 251 Fed. R. 337, 345 (N. D. Tex.).

(47) Western Loan, Etc., Co., v. Butte, Etc., Co., 210 U. S. 368.

guished, contradicted in its reasoning,[48] yet not distinctly overruled,[49] a solitary monument, with all of its props removed, wavering in the wind of criticism, a mere phantom, as it were, but of sufficient substance nevertheless to make uniformity impossible, so long as reason and not authority controls judicial decision — and even longer, for with a will to observe mere authority and forsake reason, it is still impossible to discover the authority on account of the uncertain effect of the varied decisions of the highest court.

The situation is deplorable, for no lawyer can know, except by controlling decisions in a specific district, what are his client's rights of removal in that district—in some districts the conflict has been so great that the only way to test the question is to remove the particular suit—in others, in the absence of controlling or guiding decisions, it is all guesswork; there is scarcely any proposition which can arise under the law, for which "authority" cannot be found, not only *pro* and *con*, but also midway, splitting the application of the specific rule so as to recognize classes to be differently disposed of, though the law groups them without distinction.

The situation also points to two remedies, clarified legislation and judicial organization. It may well be that a court of final review may not have jurisdiction to entertain by any process a particular class of suits for review; it may well be that Congress has withdrawn its opportunity to review under these very removal statutes;[50] but that is no sufficient excuse for the greatest imaginable diversity of administration, producing the greatest contrariety of results, without the slightest apparent effort at uniformity or system.

Review by a higher court is a convenient, but not the sole method of judically correcting judicial error, and since experience has demonstrated that in this class of cases it cannot be brought about by the exercise of reason, perhaps it might be brought about by convention through judicial organization. This is merely a new illustration of the occasion for a more systematic effort of the judiciary for uniformity of results.

It seems a fruitless task, in the face of such contrariety of results, to try and demonstrate what the law really is. But thus far we have not pointed out where the difference of opinion lies, or how it results, or wherein one or another line of decisions nullifies the purpose of Congress, as one or another, actually opposed to each other, of necessity must.

It appears proper, therefore, to enumerate those principles in which the courts are in conflict. They are, at least, these and perhaps others:

If there is doubt, the doubt (should)[51] (should not)[52] be solved against retention of jurisdiction;

A suit (can)[53] (cannot)[54] be removed across state lines;

(48) In re Moore, 209 U. S. 491; Louisville & N. R. Co. v. Western U. Tel. Co., 218 Fed. R. 91, 105, 106.

(49) In re Winn, 213 U. S. 458, 468; Ex parte Harding, 219 U. S. 363, 379; Doherty v. Smith, 233 Fed. 132, 133 (S. D. N. Y.); Guaranty Trust Co. v. McCabe, 250 Fed. R. 699.

(50) "Such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed" (Judicial Code, s. 28), whereas if the doubt be solved in favor of the retention of the jurisdiction there are methods of review even to the Supreme Court of the United States, slow though the process be. See Ex parte Park Sq. Auto. Station, 244 U. S. 412.

(51) Kamemicky v. Catterall Printing Co., 188 Fed. 400 (S. D. N. Y.); Odhner v. No. Pac. Ry. Co., 188 Fed. 507 (S. D. N. Y.).

(52) In re Mississippi R. R. Co., 241 Fed. 194, 201 (S. D. Iowa); Boatmen's Bank of St. Louis v. Fritzlen, 135 Fed. 650, 653 (8th Cir.); certiorari denied, 198 U. S. 586; Fritzlen v. Boatmen's Bank, 212 U. S. 371, 373; Strother v. Un. Pac. R. Co., 220 Fed. 731 (W. D. Mo.); Drainage District v. Chicago M. & St. P. Ry. Co., 198 Fed. R. 253 (W. D. Mo.).

(53) Mattison v. Boston & M. R. R., 205 Fed. 821, 824; Park Sq. Automobile Station v. Am. Locomotive Co., 222 Fed. 979, 991; review by certiorari refused—Ex parte Park Sq. Automobile Station, 244 U. S. 412; Stewart v. Cybur Lumber Co., Fed. 344 (S. D. Ala.).

(54) N. Y. Coal Co. v. Sunday Creek Coal Co., 230 Fed. 295 (W. Va.).

Such suit (can)[57] (cannot)[58] be so removed from a state court, though within the apparent category of removable cases, if neither party is a citizen of the state in which the suit is brought;

Such suit (can)[57] (cannot)[58] be so removed, if the plaintiff is an alien;

Such suit (can)[59] (cannot)[60] be so removed by a single non-resident defendant if there is not a separable controversy against the removing defendant;

A separable controversy, otherwise fulfilling the necessary conditions, (can)[61] (cannot)[62] be removed by a resident of the state in which the suit is brought;

A non-resident of the district (can)[63] (cannot)[64] remove a separable controversy, if his adversary is also a non-resident citizen;

A non-resident of the district (can)[65] (cannot)[66] remove a separable controversy, if his adversary is an alien;

Suit brought by an assignee (can)[67] (cannot)[67a] be removed if his assignor could not against timely objection have brought suit in the same court to which the suit is removed;

(No)[68] (An)[69] entire non-separable controversy, otherwise within a removable category, can be removed by a non-resident defendant if a co-defendant is a resident of the district into which it is removed;

Local prejudice (is)[70] (is not)[71] the controlling principle in construing the right of removal;

The intention of Congress to restrict the jurisdiction (is)[72] (is not)[73] the controlling principle in construing the removal statutes;

The right of removal of cases arising under the Constitution, Laws or Treaties of the United States (is)[74] (is not)[75] the absolute right of the defendant. If the

(55) Whitworth v. R. R. Co., 107 Fed. R. 557 (Ky.); Venal v. Continental Const, Imp., 34 Fed. 228 (W. D. N. Y.).

(56) Foulk v. Gray, 120 Fed. R. 156 (W. Va.); O'Neil v. Birdseye, 244 Fed. 254 (S. D. N. Y.); Guaranty Trust Co. v. McCabe, 250 Fed. R. 699 (2nd Cir.).

(57) Louisville & N. R. Co. v. Western U. Tel. Co., 218 Fed. 91, 104 (E. D. Ky.); Bagenas v. So. Pac. Co., 180 Fed. 887 (N. D. Cal.).

(58) Sagara v. Chicago, Etc., Co., 189 Fed. 220.

(59) Hunter v. Conrad, 85 Fed. 803 (R. I. 1898) and cases cited; Munford Rubber Tire Co. v. Consolidated Rubber Tire Co., 130 Fed. 496 (S. D. N. Y.); Boston, Etc., Co., v. Mackay, 70 Fed. R. 801 (S. D. N. Y.); Garner v. Bank, 66 Fed. 369.

(60) O'Neill v. Birdseye, 244 Fed. 254 (S. D. N. Y.). See also Hanrick v. Hanrick, 153 U. S. 192, 197, and California v. So. Pac. Co., 157 U. S. 260, where it was left undecided, and Chicago R. I. & Pac. Ry. Co. v. Martin, 178 U. S. 245, where it was not necessary to decide it, and where the cases cited did not establish the proposition for which they were cited.

(61) Hughes Federal Procedure, 337; Stanbrough v. Cook, 38 Fed. 369, 371; Natl. Bk. of Battle Creek v. Howard, 103 N. Y. Supp. 814.

(62) Thurber v. Miller, 67 Fed. 371 (8th Cir.); Wrightsville Hardware Co. v. Hardware, Etc., Co., 180 Fed. 586 (S. D. N. Y.); Whitaker v. Condon, 217 Fed. 139 (Md.).

(63) This necessarily follows from cases under note 55. Barney v. Latham, 103 U. S. 205.

(64) Foulk v. Gray, 120 Fed. R. 156, and cases cited under notes 13 to 16, above.

(65) Louisville & N. R. Co. v. W. U. Tel. Co., 218 Fed. 91, 104; Venal v. Continental, Etc., Co., 34 Fed. 228, 229.

(66) Jackson v. William Kenefick, 233 Fed. 130, 133.

(67) Cincinnati, H. & D. Ry. v. Orr, 215 Fed. 261 (E. D. N. Y.); Stimson v. United Paper Co., 156 Fed. 298 (N. D. N. Y.).

(67a) Guaranty Tr. Co. v. McCabe, 250 Fed. 699.

(68) Patton v. Meadows Co., 173 Fed. 224 (N. C.).

(69) Hunter v. Conrad, 85 Fed. 803 (R. I.) and cases cited.

(70) Foulk v. Gray, 120 Fed. 156 (W. Va.).

(71) This follows from the history of law in eliminating the conditions which of necessity implied local prejudice and inserting specifically local prejudice or influence as one ground of removal; cf. the various removal statutes as they evolved.

(72) Foulk v. Gray, 120 Fed. 156 (W. Va.).

(73) Pepper v. Rogers, 128 Fed. 987 (Mass.); New Orleans v. Quinlan, 173 U. S. 191; Jackson, Etc., Co., v. Pearson, 60 Fed. 113, 126 (Ky.); Garvin v. Vance, 30 Fed. 84, 85, 86; Hohenberg v. Mobile Lines, 245 Fed. 169, 171 (Ala.); Louisville & N. R. Co. v. West. U. Tel. Co., 218 Fed. 91, 97, 100 (E. D. Ky.); James v. Amarillo City, Etc., Co., 251 Fed. 337 (N. D. Tex.).

(74) Foulk v. Gray, 120 Fed. 156 (W. Va.).

(75) Western U. Tel. Co. v. L. & N. R. Co., 201, Fed. 932 (Tenn.).

removed suit concerns land in the district it may be retained, even though neither party is a resident.[76].

The plaintiff (has)[77] (has not)[78] the veto power upon removal into a district in which neither plaintiff nor defendant resides, of any other kind of suit otherwise removable; if the plaintiff is a citizen;[79] and (also)[80] if the plaintiff is an alien.

With the consent of both parties a suit (can)[81] (can not)[82] be removed in a state in which neither party resides.

Sometimes all defendants must join in the petition of removal,[83] sometimes they need not.[84]

I assume that many other permutations and combinations are possible as the result of the variety of constructions of the act, but I shall not attempt them; these suffice to show the labyrinth of uncertainty into which a counsellor wanders, if he is seeking to ascertain the law applicable to a particular situation; and the law varies with the district rather than with the other constituent factors.

The most direct remedy is with Congress, which ought to relieve litigants of this uncertainty and injustice; but before Congress can properly legislate, it should have two objects in mind; first, the precise end to be attained; second, clarity and therefore certainty of expression.

As to the first object, which of two considerations should control, an approximation to the invocation by a defendant at his option of the judicial power of the United States,[85] wherever it is constitutionally applicable, or the limitation of this right by any considerations of expediency, such as State pride, or the congestion of the United States Courts? And if these are to control, how far should they control?

As to the second object, of clarity and certainty, nothing should be left to implication, so far as it is possible to avoid it. Implication, arising from the assumed purpose to restrict the jurisdiction, is the rock upon which the present law has largely been wrecked.

I am not a propagandist, except for clarity and the abolition of the present confusion, but I would suggest that, other things rendering it possible, a defendant should, when assailed, have the same right to seek the protection of the judicial power of the United States for defense as a plaintiff for attack. A plaintiff having the election to sue in a proper district in the United States Courts and thus to secure the aid of the judicial power of the United States, should not also have the power (now accorded to him in many courts) by resort to a State Court in which neither party resides, to deprive the defendant of availing himself of the national judicial

(76) Gillespie v. Pocahontas Coal, Etc., Co., 162 Fed. 742 (W. Va.).

(77) Foulk v. Gray, 120 Fed. 156 (W. Va.).

(78) Whitworth v. R. R. Co., 107 Fed. 557 (Ky.); Pepper v. Rogers, 128 Fed. 987 (Mass.); Memphis Sav. Bk. v. Houchens, 115 Fed. 96 (8th Cir.); Robert v. Pineland Club, 139 Fed. 1001 (S. C.); Va-Carolina Chemical Co. v. Sundry Ins. Co., 108 Fed. 454; Iowa, Etc., Co., v. Bliss, 144 Fed. 446; Barney v. Latham, 103 U. S. 205; James v. Amarillo, Etc., Co., 251 Fed. 337 (N. D. Tex.); Hohenberg, Etc., Co., v. Mobile Lines, 245 Fed. 169 (Ala.); Louisville & N. R. Co., 218 Fed. 91, 97 (E. D. Ky.); Park Sq. Automobile Station v. Am. Locomotive Co., 222 Fed. 979, 994 (N. D. N. Y.); Boston, Etc., Co., v. Mackay, 70 Fed. 801 (S. D. N. Y.).

(79) See discussion of citizen's assumed superior rights over alien to object to jurisdiction in Doherty v. Smith, 233 Fed. at p. 132 (S. D. N. Y.) and cf. with view of same judge in Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547, 549 (2nd Cir.), that there is no conceivable reason for a distinction.

(80) Sagara v. Chicago, Etc., Ry., 189 Fed. 220; Jackson v. William Kenefick, 233 Fed. 130 (S. D. N. Y.); Odhner v. No. Pac. Ry. Co., 188 Fed. 507 (S. D. N. Y.); Kamenicky v. Catteral, Etc., Co., 188 Fed. 400 (S. D. N. Y.).

(81) Foulk v. Gray, 120 Fed. 156 (W. Va.); Corwin Mfg. Co. v. Henvici, Etc., Co., 151 Fed. 938 (Mass.); Clark v. So. Pac. Co., 175 Fed. 122 (Tex.); Maryland, Etc., Co., v. Quemahoing, Etc., 176 Fed. 303 (4th Cir.); In re Moore, 209 U. S. 491; Kreigh v. Westinghouse, Etc., Co., 214 U. S. 249.

(82) In re Wisner, 203 U. S. 449.

(83) Chicago, R. I. & Pac. Ry. Co. v. Martin, 178 U. S. 245; Gableneau v. Peoria, Etc., Ry. Co., 179 U. S. 335; Cochran v. Montgomery Co., 199 U. S. 260.

(84) Hunter v. Conrad, 85 Fed. 803.

(85) U. S. Const., Art. III, ss. 1, 2.

(86) U. S. Const., Art. III, ss. 1, 2.

power.[86] This, in my opinion, is fundamentally wrong; and I cannot see that it was ever the intent of Congress; it seems to me wholly a judicial graft, not justified by reason or rules of construction.

I am tempted to illustrate how some of the courts have erred (in my judgment) in their methods of reasoning, but the present limits of space will not permit. The opinion of Judge Cochran[87] is, however, the most complete judicial exposition of the subject of which I am aware. He even shows how, by refinement of reasoning, the courts, in respect to aliens, have so argued that *no* suit by an alien plaintiff can be removed without his consent, though Congress has expressly provided otherwise.

He likewise shows that the application of the reasoning of some courts would go as far as to prevent even a sole non-resident citizen defendant from removing a suit of the jurisdictional amount by a sole plaintiff, a citizen of the state in which the suit is brought, provided only he brings it in a district in his state in which he does not reside—a situation which could arise in twenty states having more than one federal district, but not in the other states; thus making the right of removal dependent upon a plurality of districts in a state, though all other conditions are identical (p. 106).

The opinion of the Supreme Court of the United States in the (mis)leading case of *In re Wisner*[87a] has been the subject in turn of unquestioning subserviency, harsh and bitter criticism, reasoned distinction and destructive modification.

If the historic evolution of the statutes had received due consideration in the effort to construe, I feel satisfied that the rule of liberality would have reigned, and not the rule of restriction, as now; another fault that has left its impress upon the result is, in my opinion, the failure to perceive that the grant of the right of removal necessarily *implies* a jurisdiction in the court to proceed, whereas the courts have looked for the jurisdiction in the grant of the power to entertain suits originally instituted.[88] There can be slight doubt that in the original removal statute of 1789,[89] the jurisdiction of removed suits was a *necessary implication* from the grant of the right of removal, or that this implication remained in each of the independent removal statutes of 1866[90] and 1867,[91] or that the implication remained when they were consolidated into section 639 of the Revised Statutes, and also when they were modified and the right enlarged in the judiciary act of 1875;[92] the confusion began with the Act of 1887-1888,[93] when a reference intended to define a *class of suits* by reference to a preceding section was misconstrued to be a limitation upon the *district* to which a suit could be removed. Since the beginning of the system there has been but one district provided by statute to which the suit could be removed, namely, the district in which the suit was pending in the State Court; the further limitation of this district, by conditions of residence of the parties imported from other parts of the acts or of the judicial code, is what has led to the inextricable and irreconcilable confusion of subsequent decisions. The words "proper district" introduced into the Act of 1875 for purposes of brevity[94] and to enable the draughtsman to separate remedial from procedural provisions in two sections of the act, instead of confusing them in a single section as theretofore, was the specific opening of Pandora's box, for instead of giving "proper district" its

(87) Louisville & N. R. R. v. Western U. Tel. Co., 218 Fed. R. 91. To same effect Doherty v. Smith, 233 Fed. 132, 133 (S. D. N. Y.); Jackson v. William Kenefick, 233 Fed. 130 (S. D. N. Y.).

(87a) 203 U. S. 449.

(88) See Hohenberg & Co. v. Mobile Lines, 245 Fed. 169 (Ala.).

(89) Act 1789, c. 20; 1 Stat. at L. 73, s. 12.

(90) Act 1866, c. 288; 14 Stat. at L. 306.

(91) Act 1867, c. 196; 14 Stat. at L. 558.

(92) Act 1875, c. 137; 18 Stat. at L. 470.

(93) Act 1887, c. 373; 24 Stat. at L. 552; Act 1888, c. 866; 25 Stat. at L. 433.

(94) Louisville, Etc., Ry. Co., v. W. U. Tel. Co., 218 Fed. 91, 102.

almost obvious significance[95] derived from a historical study of the acts, those courts which have given it its distorted meaning, of the district in which the suit could originally have been brought at the option of the plaintiff, and those courts which have limited this distortion by the further condition that such district must also be the district in which in the state court the suit is pending, have alike, as I see it, arbitrarily and unnecessarily departed from an easy and almost obvious construction, justified by historical evolution of the right of removal, that the sole "proper" district of removal is the district in which the suit is pending in the state court, that the *right* is granted to the defendant or one or more defendants, that it was never contemplated that the plaintiff, whether alien or citizen, could successfully object to the removal to this district,[96] if the suit is removable in its nature.

The temptation is strong to point out in detail the reasons for these conclusions, by a careful and discriminating study of the successive acts of 1789, 1866, 1867, the Revised Statutes 1875, 1887-1888 and the Judicial Code, and by a critical study of the judicial decisions, but such method of treatment would transcend the necessary limits of this article, and I must refrain, especially as my object is not to construe the law or to convince the reader of its proper construction, but rather to point the directing finger of remonstrance at the fact that the condition is intolerable, that it demands *prompt* correction from Congress, and that it adds another argument to the increasing demand for the organization of the judiciary, Federal as well as State.

CHARLES A. BOSTON.

New York, N. Y.

(95 Manufacturers, Etc., Co., v. Brown, Etc., Co., 148 Fed. 308 (S. D. N. Y.).

(96) Hohenberg v. Mobile Lines, 245 Fed. 169, 171 (Ala.).

RAILROADS—NATURE OF THE CONTROL OF THE DIRECTOR GENERAL

FRANK S. VAUGHAN v. THE STATE.

(Court of Appeals of Alabama, March 18, 1919.)

Under Act of Congress of August 29, 1916, providing for the federal control of railroads and the orders of the President and Director General, the railroad companies are not deprived of the right of ownership and direction of their properties which are brought under the supervision and control of the Director General and therefore it is sufficient to lay the ownership of the goods in the corporation in an indictment for the larceny of such goods or for like offenses.

BROWN, P. J. The verdict of the jury responds to the first count of the indictment, charging that the defendant "did buy, receive, conceal, or aid in concealing, thirty-three caddies of tobacco of the value of one hundred and sixy-four dollars, the personal property of the Louisville & Nashville Railroad Company, a corporation, knowing that it was stolen and not having intent to return it to the owner." There was evidence tending to support the averments of the indictment, unless the contention of appellant that there was a variance in the averments and proof, is sustained.

As a predicate for the contention that there is a fatal variance between the averments and proof, entitling the defendant to an acquittal, the bill of exceptions recites that:

"It was admitted as a fact by and between the State of Alabama, through its solicitor, on the one part, and the defendant, on the other, that on the first day of April, 1918, the Louisville & Nashville Railroad Company was taken over by the United States Government under and by virtue of an act of Congress entitled, 'An Act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners and for other purposes,' which act was approved March 21, 1918, and that from said date of April 1, 1918, up to the present time, said railroad has been so operated and was being so operated and controlled at the time of the alleged commission of the offence. This fact is admitted as being true."

This is an admission by the appellant that the corporation, as well as its physical property and facilities of transportation, was under Federal control at the time of the commission of the offence and carries with it the idea that the government, in assuming control of the transportation facilities of the country for mili-

tary purposes, commandeered and mobilized the services of the carriers themselves.

Under this theory of Federal control the identity of the carrier,—the corporate entity,—has not been destroyed, nor has it been rendered wholly impotent in respect to its functions in the conduct of the business. It has merely become an agency of the government for the purpose of carrying out the policy of preferring the movement of troops, military equipment and military supplies over matters of general commerce, and, as such agent, is a bailee of goods committed to it for transportation, and it is sufficient to lay the ownership of the goods in the corporation in an indictment for the larceny of such goods, or for like offences. Viberg v. State, 138 Ala. 100; Fowler v. State, 100 Ala. 96.

The act of Congress of August 29, 1916, to which the President's proclamation assuming Federal control of railroads is referable, provides:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."—U. S. Comp. Stat., 1918, section 1974a.

We take the following excerpt from the act of Congress of March 21, 1918:

"The President, having in time of war taken over the possession, use, control and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917. * * *

"All claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. * * * Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation. * * *

"Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law, or suits in equity, may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made hereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to any Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier," etc.—U. S. Compiled Statutes, 1918, pp. 456, 459.

From the general orders of the Directors General of Railroads, we take the following:

[Here the court recites the provisions in many general orders which refer to "Carriers" as separate organizations controlling *their own* lines through *their own* officers but all under the supervision and control of the Director General.]

The act of Congress of April 21, 1918, and the orders of the Director General of Railroads from which we have taken the foregoing excerpts clearly evince a construction of the act of August 25, 1916, and the action of the President thereunder inconsistent with the view that Federal control extends to, and embraces, only the property and facilities of the transportation companies. In fact, the act of April 21, 1918, defines the terms "system or systems of transportation" as used in the act of August 25, 1916, and the proclamation of the President, thus: "The President, having in time of war taken over the possession, use, control and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers)." etc.

The "systems of transportation" or "carriers,"—if the language used in the quoted excerpts is to be given its ordinary meaning,—have officers and employers, are capable of contracting and being contracted with, may sue and be sued, plead and be impleaded, are entitled to compensation, are capable of arbitrating differences with the government, are authorized to settle and adjust claims, and declare dividends; in short, are capable of exercising all the functions and powers of corporations with limitations essential to Federal control and the carrying out of the purposes of the government,—preferring the movement of war material and army supplies over other commerce,—to meet the extraordinary conditions imposed by the fact that the United States is at

war with a foreign power. These facts lead to the inevitable conclusion that Federal control of the transportation systems of the country contemplated and effected a mobilization under one head of the persons and corporations engaged in the business as well as the facilities of transportation for the purpose of meeting and coping with these extraordinary conditions, and the "Director General of Railroads" is just what this designation or title imports,—the general in command of the army of transportation.

But the appellant in this case has cited General Order No. 50, made by the Director General of Railroads, as opposing the view that the transportation companies themselves are under Federal control. We here quote that order and excerpts from the amendment thereto:

[Here the court sets forth Orders No. 50 and No. 50a, See 88 Cent. L. J. 101.]

In view of the express provisions of the act of Congress that "while under Federal control, actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," etc., and other considerations hereafter to be stated, it is a question of serious doubt whether the making of this order is within the scope of the Director General's authority; but, assuming that it is, his authority is sustainable on no other theory than that the transportation companies themselves are under Federal control, and, therefore, within his jurisdiction. If they are not under his jurisdiction, what authority has he to say that they cannot be sued, and why is it necessary for him to so say? If the transportation companies have no connection with the operation of the railroads, this fact is a complete defense to any action against them and this order is wholly futile. Moreover, if the transportation companies are under Federal control, the Director General is without authority to interfere with the orderly administration of justice or to set aside the ordinary and usual course of procedure in courts of justice according to the course of the common law and deny to a plaintiff the right to pursue his ordinary legal remedy against one who, he alleges, has transgressed or violated his rights.

Such a proceeding as authorized by this general order would effect an entire change of parties, and after a plaintiff has pursued his remedy to judgment, it would not be enforceable. Confessedly the Director General is not personally liable, and there is no statute or authority for binding the government in such a proceeding, and this course would clearly amount to a denial of due process of law in violation of the constitution, both state and Federal. Rul. Cas. law, pp. 433, 446 inc., embracing secs. 430-441.

The act of the government in assuming Federal control is referable solely to the exercise of military power as a means of meeting the emergencies imposed by a state of war. It can be justified on no other theory, and it is a well established rule of law that persons engaged in the military service of a nation are not liable in an action for damages for acts done in the course of their military duties in obeying a legal order. Little v. Bartene, 2 Cranch. 170; Luther v. Burden, 7 How. 1; Mitchell v. Harmony, 13 How. 115; Bean v. Beckwith, 18 Wall. 510; Bates v. Clark, 95 U. S. 204; Dow v. Johnson, 100 U. S. 158; 18 Rl. Cas. Law, p. 1082, par. 75.

And likewise, that the government is not liable to be sued for the tortious conduct, misfeasance or laches of its officers or employees, unless its consent thereto is given by some act of Congress. Bigbee v. United States, 108 U. S. 400; Stanley v. Schwalby, 162 U. S. 255. And this rule of immunity of the government from being sued prevents the substitution of an officer of the government as a party where the purpose of the suit affects the right or determines the liability of the government. Oregon v. Hitchcock, 202 U. S. 60; Naganob v. Hitchcock, 202 U. S. 473; Louisiana v. McAdoo, 234 U. S. 627.

The apparent theory of General Order No. 50 is that while the carriers are operating under Federal control, they are mere agents of the government, and if liability for their torts and the torts of their employees exists, it is against the government and not the carrier, and therefore, actions for such torts should be against the Director General of Railroads and not against the carrier. It is only on this theory that the Director General would have even colorable authority to interfere with a suit against a transportation company, and this theory undoubtedly conflicts with the principles above stated. The only authority for suing a carrier while under Federal control must be rested upon the act of Congress which subjects them "to all laws and liabilities as common carriers, whether arising under State or Federal law, or at common law," with certain exceptions, and provides that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," etc. U. S. Comp. Stat. 1918, pp. 456-459. And the validity of this statute is sustainable on no other theory than that the transportation companies are operating their

respective systems under Federal control. If such companies are in no way connected with the operation of their respective transportation systems, we submit that it would not be within the power of Congress to subject them to liability and suits thereon for the torts, miscarriages and defaults of the employes of the Federal government. Such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law. Zeigler v. S. & N. A. R. R. Co., 58 Ala. 235; Mobile Light & R. R. Co. v. Copeland & Sons, 15 Ala. App. 235; Bank of Columbia v. Oakley, 4 Wheat. 235; Hirto v. California, 110 U. S. 516; Dent v. West Virginia, 129 U. S. 114; Leeper v. Texas, 139 U. S. 462; Giozza v. Tiernan, 148 U. S. 657; Jones v. Brim, 165 U. S. 180; Maxwell v. Dow, 176 U. S. 581; 6 Rul. Cas. Law, pp. 433-446, embracing paragraphs 430 to 442, on Constitutional Law.

On the other hand, if the carriers are operating under Federal control and are agencies of the government, the authority of Congress to impose liability on the carriers for the torts of their employees is clearly sustainable on the theory that such responsibility encourages caution on the part of the carriers and their employees, promotes efficiency and safeguards the interests of the government and the general public.

There is no proof in this case that the railroad administration, in the exercise of Federal control, has excluded the transportation companies from the exercise of their functions in the operation of their respective systems, and we cannot assume that it has done so contrary to the manifest purpose and spirit of the authority conferred by the act of Congress, and the proclamations of the President.

The foregoing considerations lead us to hold that the Louisville & Nashville Railroad Company is under Federal control and is exercising its functions and operating its system as an agency of the government and as such was bailee of the property alleged to have been stolen, and the ownership thereof was properly laid. This disposes of all questions presented by the record and finding no error therein, the judgment will be affirmed.

Affirmed.

NOTE.—*General Orders by Director General Practically Construed.*—The point in the instant case appears narrow, but in logical inference it is quite broad.

In a recent case decided by the district court of Nebraska it was held lawful to substitute the name of the Director General of Railroads for that of a railroad as defendant in an action brought against the railroad, the court saying "the office of the Director General is analogous to that of a receiver of the railway companies," citing receivership cases. Rutherford v. Union Pac. R. Co., 254 Fed. 880.

It was said: "By the acts of Congress the President was given authority to exercise control of the railroads by such agencies as he should determine. He may appoint one or many persons or one or many partnerships or corporations to carry out his will, and to perform the business of carriage of goods and passengers over the several railroads." This change was by express direction of order No. 50 by the Director General.

In district court for Southern District of New York it was held in an action against a railroad that the Director General did have the right to represent to the court that it was prejudicial to the interests of the government for a cause presently to be tried and that it was in the discretion of the court to stay or not the trial, but the burden was nevertheless on defendant to show there would be substantial prejudice. Harwick v. Pennsylvania R. Co., 254 Fed. 748. This case shows a default by plaintiff and a motion to open same and it was urged that where it appeared that plaintiff had acquiesced in the removal of the cause from the state to the federal court and thereby vested the latter with jurisdiction, the orders of the Director General were for reasonable interpretation by the court, notwithstanding Congress provided that all orders by the Director General should have permanent authority and be obeyed as such. The court also in this case recognizes full authority by the Director General to control, but his orders do not divest the court of discretion in the exercise of its duties.

In the District Court of New Jersey, the operation of the Elkins Act was held not to be suspended by the Presidential order but an embargo arising out of arrangement by the Director General, though it gave preference to war material, was but a regulation incident to control by him and within the power which the President had assumed. It was suggested also that if discrimination were actually brought about, where imposed by a carrier, application should have been made to the Interstate Commerce Commission for relief, but it is not said specifically that the party complaining could arrest or affect an embargo brought about by Director General. United States v. Metropolitan Lumber Co., 254 Fed. 335.

In District Court, Eastern District of South Carolina, it was held in a case where there was a levy on certain real estate of a railroad company that in effect the Director General was not in possession of same so as to arrest execution and sale. U. S. Railroad Administration v. Busch, 254 Fed. 140.

It was said that it did not appear that this particular property came into the Director General's possession, which is tantamount to saying that only property of a railroad which was necessary in transportation passed to the Direc-

tor General and therefore there was no apparent divesting of the possession of ownership of the particular property in question. Guardedly, however, the court said: "If it in any wise appeared to the court that the Atlantic Coast Line Railroad Company was itself bona fide, seeking relief because it had been actually divested of the possession of the property by the act of the government and that it had in consequence been deprived of the power and means to pay its creditors, the case would be otherwise."

Here it would seem that the Director General's possession may cut in several ways, but after all it is a question of fact as to what may be under the Director General's control or possession not from a technical aspect or exclusively in his interest or in the strict purview of the President's proclamation. All of this may be enlarged in one case and greatly restricted in another case.

In the District Court of the Eastern District of Missouri the right of the Director General to make general orders is squarely upheld, the case having special reference to General Order No. 18 providing that employes may not sue in remote jurisdictions, because this requirement is highly prejudicial to the interests of government and interferes with the physical operations of railroads and unnecessary for the right and just interests of plaintiffs. So held as to plea in abatement filed by defendant railroad company. Wainright v. Pennsylvania R. Co., 253 Fed. 459.

The reasoning of the court spoke of witnesses being required to leave trains and travel great distances to attend court and this necessitating their absence from trains for days and sometimes for a week. It must be thought something of a novelty that a rule should be declared reasonable which aims at such a thing. Witnesses presumptively could not be summoned into distant jurisdictions. Their testimony could be taken by deposition and process itself would not be respected where issued in one jurisdiction to be obeyed in another. The rule speaks of their being required to travel sometimes for hundreds of miles. It does not seem that a plea of abatement on this ground presents a jurisdictional issue, or on its face a reason for an indefinite stay of an action. It is rather a case of putting defendant railroad on terms in the production of his evidence.

In Cocker v. New York O. & W. Ry. Co., 253 Fed. 676, rule 26 was held rather a reason for a transfer of a cause from one court to another, the court saying "the court is not expected to act automatically * * * but that in each case, upon the facts shown the court is to determine whether the just interests of the government" would suffer or not.

Thus from the review I have made of cases the authority of the government in taking over the control of railroads as a war measure is sustained, but it is upon practical considerations determined what is to be the force and effect of general orders of the Director General. Some regard is to be taken of rules of law, but these are subject to such application as the needs of governmental regulation demand. C.

CORRESPONDENCE.

AFFIRMING CASES WITHOUT OPINION.

Editor Central Law Journal:

I read Judge Bruce's article on "Judicial Buncombe" in a recent number of the Journal, as well as Judge Robinson's reply in the following number, with much interest. I am not writing with the idea of taking any part in the controversy between the two judges but simply to correct a statement made in Judge Bruce's article. He says on page 139 "In Wisconsin indeed where the latter practice *(i. e. the practice of affirming cases without opinion)* was adopted with much flourishing of trumpets and heralded as a great reform and saving of printer's ink it was not long before the bar rebelled and it had to be discontinued."

I have a very pleasant acquaintance with Judge Bruce and I know he would not make any statement which he did not believe to be true. For this reason, if for no other, it surprises and pains me that he should make so sweeping, almost sneering statement without verifying the facts stated.

As a matter of fact the Supreme Court of Wisconsin in May, 1915, adopted the plan of writing no opinions, in case of affirmance in certain classes of cases, and has never abandoned it. The Court has proceeded cautiously; probably not more than ten per cent of the cases were decided without opinion during the first year, but at the present time nearly or quite fifteen per cent are disposed of in that way. The general principle applied is that, where a case involves mere questions of fact or well established principles of law and has been correctly decided below an opinion simply adds unnecessarily to the welter of case law with which the profession and the courts are struggling

There has been at no time any thought here of discontinuing this practice nor have we heard of any rebellion of the bar. Neither do I know of any flourishing of trumpets when the practice was adopted. Certainly there was nothing of that kind done by the Court. It was fully appreciated that it was an experiment which might have to be abandoned and which should be entered upon with care. There was no further publicity given to it than was necessary to bring it to the attention of the bar, namely, the adoption and publication of a rule worded as follows:

"In cases where the order or judgment is affirmed opinion will not hereafter be written unless the questions involved be deemed by this Court of such special importance or difficulty as to demand treatment in an opinion."

If the publication of this rule be a "flourshing of trumpets" then the Court is guilty of the breach of good taste which Judge Bruce seems to ascribe to it, but not otherwise. If others have "flourished trumpets" the Court ought not to be blamed for it.

JOHN BRADLEY WINSLOW.

Madison, Wis.

A LEGAL REFORM.

Editor, Central Law Journal:

Among the bills just signed by the president is one which has often been commended in your columns and which the American Bar Association has been urging upon congress for eight years. It enacts for the Federal courts that "in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." This rule was prescribed by the Supreme Court for practice in courts of equity as long ago as 1912. It is the last of a series of improvements which the association has recommended and which have been enacted.

Among the most important of these are the acts providing that equitable defenses may be interposed in an action at law that if a mistake has been made in bringing a suit at law which should have been in equity, or vice versa, the suit shall not be dismissed, but shall be prosecuted by proper amendment; that defects in averments of citizenship shall be amendable even on an appeal, and that a decision of a state court that an act of state legislation is in violation of the United States Constitution may be reviewed by the Supreme Court.

These reforms will greatly facilitate the speedy decision of cases upon the merits. May not the American Bar Association say with Milton: "Peace hath her victories no less renowned than war"?

EVERETT P. WHEELER,

Chairman American Bar Association Committee on Reformed Procedure, New York City.

HUMOR OF THE LAW.

Counsel—I'm sorry I couldn't do more for you.

Convicted Client—Don't mention it, guvner; ain't five years enough?

This has been given to the London correspondent of the *Manchester Guardian* as the truth of what M. Clemenceau said when the draft of President Wilson's original note with the fourteen points was handed to him.

He said: "Quatorze points! Mais cela 'c'est un peu fort—le bon Dieu n'en avait que dix."

A newspaper in a prohibition state contained the following: "Bill Jones was acquitted of violating the prohibition law, and was sentenced to pay a fine of $100 or serve three months at hard labor; the balance of the fine to be suspended during good behavior on payment of $50." We are just wondering what punishment would have been inflicted upon Bill had he been convicted instead of acquitted. —National Corporation Reporter.

During an address to a body of law students ex-President Taft pointed out that too much care cannot be taken in the selection of the jury. In this connection he told of an intelligent looking farmer who had been examined by both defense and prosecution and was about to be accepted when the prosecutor chanced to ask:

"Do you believe in capital punishment?"

The farmer hemmed and hawed and after a moment's reflection replied:

"Yes, sir; I do, if it ain't too severe."—St. Louis Star.

The great detective stood before the rich merchant, waiting for his instructions.

"It's this way," began the merchant, "I've been robbed of hundreds of pounds. A rascal has gone about the country pretending to be a collector of ours. He has simply coined money. Why, in a week he collected more than all our travelers put together. He must be found as quickly as possible. Spare no expense."

"Right," said the detective. "Within a week he will be in prison."

"Prison! What do you mean?" cried the merchant. "I don't want him arrested; I want to engage him."—Tit-Bits.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Adverse Possession**—Coterminous Owners.—If one of two coterminous owners takes possession and claims title to the extent of his possession, he hold adversely, although he was induced to locate his possession through a mistake as to the boundary.—Wagner v. Meinzer, Cal., 177 Pac. 293.

2. **Attorney and Client**—Abandoning Employment.—The contract of an attorney with his client is an entire and continuous one, and he cannot abandon the service of his client without sufficient cause.—State v. Bersch, Mo., 207 S. W. 809.

3. **Bankruptcy**—Insurance.—The cash surrender value of policies on bankrupt's life, the beneficiaries in which he could change, is property which he could have transferred prior to bankruptcy, so that right thereto passed to the trustee.—Cohn v. Malone, U. S. S. C., 39 S. Ct. 141.

4.——Jurisdiction.—The power of a bankruptcy court to stay suits against the bankrupt is expressly confined to the period before determination of discharge proceedings, and a District Court can have no wider power to stay suits in a state court on an auxiliary bill dependent upon the bankruptcy proceedings.—Pell v. McCabe, U. S. D. C., 254 Fed. 356.

5.——Materialmen.—A trustee in bankruptcy holds his title to property of a corporation subject to liens filed by materialmen and laborers within the time prescribed by statute.—Church E. Gates & Co. v. Empire City Racing Ass'n, N. Y., 121 N. E. 741, 225 N. Y. 142.

6.——Record Title.—A trustee in bankruptcy, when there are creditors of bankrupt entitled to invoke an estoppel against owner of realty, the apparent record title of which was in bankrupt and on faith of which credit had been extended to him, may maintain action to appropriate property to extent of claims of such creditors.—Bergin v. Blackwood, Minn., 170 N. W. 508.

7.——State Courts.—An action to set aside conveyances for fraud can be brought in state court by a creditor notwithstanding bankruptcy proceedings against defendant, even though such proceedings be regarded as in the nature of an action in the federal court.—Board of Directors v. Lowrance, S. C., 97 S. E. 830.

8. **Bills and Notes**—Correspondence.—In an action on a note which defendant claimed had been paid, it appearing that the holder had transmitted it to a bank which took up the same and paid the holder, held that correspondence between the holder and such bank was admissible, as tending to show payment.—Stark v. Scherf, Mo., 207 S. W. 863.

9.——Draft with Bill of Lading.—Where bank took a draft with bill of lading attached and credited amount to drawer, who checked it out on following day, and the bank forwarded draft to its correspondent for collection and it was paid, the proceeds belonged to forwarding bank.—First Nat. Bank v. Stallings, Okla., 177 Pac. 373.

10.——Scroll.—The mere addition of a scroll after the signature on a note, without words of reference or adoption in the note itself, did not make it a sealed instrument.—Long v. Gwin, Ala., 80 So. 440.

11. **Brokers**—Consummated Sale.—Broker's employment to find purchaser for his principal's property does not, in absence of stipulation, render principal liable for commissions to broker in case of sale by principal to any customer not procured by broker, provided principal's sale was consummated before performance by broker.—Morris v. Clark, Ala., 80 So. 406.

12. **Cancellation of Instruments**—Rescission.—When transaction out of which a conveyance results involves payment of a valuable consideration by grantee, the grantor cannot have the land and the money too, and if he elects to rescind and reclaim land, he must restore or offer to restore what he has received from his grantee, and should by his pleading inform the court as to such facts.—Grundy v. Greene, Tex., 207 S. W. 964.

13. **Carriers of Goods**—Delivery.—Without a special contract, a common carrier is not an insurer of the time of delivery, but must use diligence and deliver within a reasonable time.—National Elevator Co. v. Great Northern Ry. Co., Minn., 170 N. W. 515.

14.——Loss en Route.—Loss or damage to property in course of transportation through explosion of war munitions, also in transit, cannot be considered in a legal sense an "act of God."—John Lysaght, Limited, v. Lehigh Valley R. Co., U. S. D. C., 254 Fed. 351.

15. **Carriers of Passengers**—Alighting Passenger.—It is duty of carrier's employes to assist alighting passenger whenever circumstances are such that it is reasonably apparent that assistance is reasonably necessary, but they are not required to exercise diligence to discover enfeebled condition of passenger.—Olson v. Des Moines City Ry. Co., Iowa, 170 N. W. 466.

16.——Intending Passenger.—As to one who is intending to take passage, and is approaching in the manner and by the means provided by the carrier, the carrier is held merely to ordinary care.—Hart v. King County, Wash., 177 Pac. 344.

17. **Champerty and Maintenance** — Adverse Possession.—A possession that will make a sale of lands champertous must be an adverse one, which will ripen into a legal title.—Combs v. Adams, Ky., 207 S. W. 691.

18. **Chattel Mortgages**—Incumbrance.—Mortgagor has the right to sell the incumbered property, subject to the incumbrance.—Weeks v. First State Bank of De Kalb, Tex., 207 S. W. 973.

19. **Commerce**—Intoxicating Liquors.—Transportation of liquor on the person of a passenger from one state to another is "interstate commerce," within the regulatory power of Congress.—United States v. Hill, U. S. S. C., 39 S. Ct. 143.

20.——Workmen's Compensation Act.—The federal Employers' Liability Act applies, and there is no liability under the state Workmen's Compensation Act, if employe at time of injury was engaged in interstate commerce.—Wangerow v. Industrial Board, Ill., 121 N. E. 724.

21. **Conspiracy**—Workmen Combining.—Workmen have legal right to combine to get advantage of bargaining for their common benefit in respect to the terms and conditions upon and under which they shall work.—Shinsky v. O'Neil, Mass., 121 N. E. 790.

22. **Contracts** — Consideration. — Defendant's agreement to charter vessel to plaintiff, if he, defendant, should buy her, being then in negotiations, was not void for want of consideration or mutuality of obligation as conditioned on defendant's will.—Scott v. Moragues Lumber Co., Ala., 80 So. 394.

23.——Duress.—A contract procured by duress is not void, but voidable only; and, if a party elects to repudiate it, he must do so within a reasonable time after the duress has been removed.—Deibel v. Jefferson Bank, Mo., 207 S. W. 869.

24.——Letters and Telegrams.—The interpretation of a contract created solely by letters and telegrams is a matter of law for the court.—Carstens Packing Co. v. Sterne & Son Co., Ill., 121 N. E. 737.

25.——Meeting of Minds.—There must be a concurrence of intention to constitute a contract, and the minds of the parties must meet as to all essential elements involved in the contract and as to the subject-matter and as to their respective rights and duties.—C. W. Cochran Lumber Co. v. Paterson & Edey Lumber Co., Ala., 80 So. 448.

26.——Modification.—Consideration for original contract is sufficient to support subsequent modification of contract.—Pacific Power & Light Co. v. White, Wash., 177 Pac. 313.

27.——Unilateral.—A contract ordinarily unilateral may become bilateral and binding when it loses its unilateral character and stands as valid from the fact that an obligation has arisen with a second party, so that mutuality, or a consideration, appears as a binding force.—Warren v. Ray County Coal Co., Mo., 207 S. W. 883.

28.—**Covenant**—Incumbrance.—An assessment which did not exist when land was conveyed was not an "incumbrance" within a covenant against incumbrances.—Jaques v. Tomb, Cal., 177 Pac. 280.

29. **Criminal Law**—Changing Plea.—Whether defendant, after having pleaded "not guilty" on day of arraignment, shall be permitted to change plea on day of trial to "not guilty, by reason of insanity," is discretionary with court.—Knott v. State, Ala., 80 So. 442.

30.——Other Crimes.—If the character of a crime is such as to show upon its face the intent with which it is done, evidence of other crimes is inadmissble to show intent.—State v. Bersch, Mo., 207 S. W. 809.

31.——Voluntary Confession. — A voluntary confession standing alone is insufficient to prove the commission of a crime.—State v. Herman Krasne, The Novelty Skirt Co., Neb., 170 N. W. 494.

32. **Crops**—Emblements.—Wheat and oat crops are emblements—fructus industriales—and are chattels personal, and are not real property.—Power Mercantile Co. v. Moore Mercantile Co., Mont., 177 Pac. 406.

33. **Damages**—Increased Cost of Living.—The increase in the cost of living must be to some extent taken into consideration in determining whether verdict for personal injuries of a permanent nature is excessive.—Noyes v. Des Moines Club, Iowa, 170 N. W. 461.

34.——Trespass.—In an action for damages for injuries to sheep, crops, and loss of time for trespass committed by defendants' dogs, damages for the mental distress of plaintiff are not recoverable.—Stephens v. Schadler, Ky., 207 S. W. 704.

35. **Dedication**—Grant by Deed.—Dedication may be either express or implied. It is "express" when the purpose to devote the land to public use is by grant, as by deed; and "implied," where an intention to devote the land to public use is clearly manifested by the conduct of the owner—the animus dedicandi being the essential element of dedication.—Wensel v. Chicago, M. & St. P. Ry. Co., Iowa, 170 N. W. 409.

36. **Deeds**—Condition Precedent.—The general rule is that where a deed is to take effect on the performance of a condition by the grantee, and the grant is without other consideration, no title will pass until the condition is performed; but where other conditions have been performed, and especially where full value has been paid, the condition will be considered a condition subsequent.—Manton v. City of San Antonio, Tex., 207 S. W. 951.

37.——Fraudulent Representation.—Where an 85-year-old woman, practically blind and unable to read, is induced by her daughter and son-in-law to sign a deed to land under the fraudulent representation that it was an instrument authorizing the daughter to manage the land, the deed will be canceled.—Livingston v. Bothwell, Ala., 80 So. 462.

38. **Easements**—Prescription.—Where a railroad company was in possession of a right-of-way as lessee, no prescriptive way over such right-of-way could be acquired, for the law will not presume a grant from the apparent acquiescence of one who could not have made it.—Cincinnati, N. O. & T. P. Ry. Co. v. Sharp, Tenn., 207 S. W. 728.

39.——Servitude.—Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance the servitude is in use and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law.—Indiana Truck Farm Co. v. Chambers, Ind., 121 N. E. 662.

40. **Embezzlement**—Acts in Series.—Where the evidence shows that the embezzlement of an aggregate amount has been accomplished by a continuous series of withholding sums not separately capable of proof, the crime is a continuous one, and proof thereof is sufficient to sustain a conviction of embezzlement of such aggregate amount.—State v. Dawe, Idaho, 177 Pac. 373.

41. **Escrows**—Delivery.—A deed cannot be delivered to the grantee as an escrow, and if delivered to him it becomes an operative deed, freed from any condition not expressed in the deed itself.—Manton v. City of San Antonio, Tex., 207 S. W. 951.

42. **Estoppel**—Covenant of Warranty.—Where a person, having purchased realty and personalty from one who had no title, conveyed with covenants of warranty one undivided half interest in the "property purchased from" his vendor, his vendee acquired an undivided half interest in the property when the vendor of the half-interest subsequently acquired perfect title from

a different person.—Cobbs v. Union Naval Stores Co., Ala., 80 So. 415.

43. **Executors and Administrators**—Attorney Fees.—Where a note given by a decedent provided for payment of attorney's fees, his estate is liable therefor, where in a suit thereon against his administrator a claim for such fees is entered and notice of claim is served as prescribed by statute.—Penick Supply Co. v. Anderson, Ga., 97 S. E. 889.

44. **Fixtures**—Gas and Electricity.—Gas and electric fixtures, as ordinarily attached to a house or other building for use, are, in actions between grantor and grantee, landlord and tenant, and mortgagor and mortgagee, held to be personal property.—Wahle-Phillips Co. v. Fitzgerald, N. Y., 121 N. E. 763, 225 N. Y. 137.

45. **Frauds, Statute of**—Memorandum.—Written memorandum of executory contract to sell wheat, signed by seller and buyer, held sufficient to satisfy statute of frauds, not being indefinite as to price, nor faulty because not expressing time for payment, despite unexpressed agreement that price should be paid when warehouse receipts were delivered; delivery to be made at place chosen by seller.—Dement Bros. Co. v. Coon, Wash., 177 Pac. 354.

46. **Fraudulent Conveyances**—Contingent Remainder.—A debtor cannot create a trust in his own favor in his own property and provide conditions against the property being subject to the payment of his own debts, even though he provides for a contingent remainder in third persons in view of Rev. St. 1909, § 2880.—Jamison v. Mississippi Valley Trust Co., Mo., 207 S. W. 788.

47. **Habeas Corpus**—Constructive Contempt.—In a habeas corpus proceeding brought to obtain release from imprisonment for constructive contempt, the inquiry is limited to the consideration of the question whether the court was, by affidavit filed, invested with jurisdiction to hear and determine the contempt proceedings.—Ex parte Selowsky, Cal., 177 Pac. 301.

48. **Homestead** — Residence. — If intestate's widow claims homestead or property in lieu thereof under general law, she must be a resident of the state at the time in order to get the benefit of the statute.—In re Lavenberg's Estate, Wash., 177 Pac. 328.

49. **Husband and Wife**—Antenuptial Contract.—Under the provision of an antenuptial contract, waiving dower and curtesy, that each spouse should contribute from separate property to the family's running expenses, the "family" consists of both spouses, and ceases to exist when one dies.—In re Mansfield's Estate, Iowa, 170 N. W. 415.

50.——Constructive Fraud.—The fact that defendant at the request of her husband signed note containing stipulation to effect that either party might sue the other in any court having jurisdiction of the subject-matter would not bring the case within the rule of constructive fraud, based upon confidential relation between the parties to the contract.—Thompson v. Union Springs Guano Co., Ala., 80 So. 409.

51. **Injunction** — Exclusive Agency. — Under Rev. St. 1909, § 2534, authorizing equitable relief to prevent any legal wrong when an action for damages is not adequate, equity will enjoin defendants' unjustified breach of their contract making plaintiff their exclusive sales agent for coal from mine, where no other coal of like quality could be had for his customers and where he would be subject to their suits for damages.—Warren v. Ray County Coal Co., Mo., 207 S. W. 883.

52.——Trade Secrets.—Equity will protect against unwarranted disclosure of trade secrets, confidential communications, and the like.—John Davis & Co. v. Miller, Wash., 177 Pac. 323.

53. **Insurance**—Expectancy.—In view of laws of fraternal aid union providing that no beneficiary shall have or obtain any vested interest in said benefit, beneficiary in certificate of insurance had a mere expectancy which could be destroyed by valid contract between insured and the union. Frain v. Fraternal Aid Union, S. C., 97 S. E. 836.

54.——Misrepresentation.—A "material representation" is one that would influence a prudent insurer in determining whether to accept the risk or in fixing the amount of premium in event of its acceptance.—Life Ins. Co. of Virginia v. Pate, Ga., 97 S. E. 874.

55.——Public Interest.—An insurance broker who by Act S. C., March 2, 1916, is made representative of insured, and who is also representative of the insurer, is, like the business of insurance of which he is an instrument of consummation, clothed with a public interest, and so subject to the regulating power of the state.—La Tourette v. McMaster, U. S. S. C., 39 S. Ct. 160.

56. **Joint Tenancy** — Survivorship. — Where owners of property, with no intention to abandon contracts creating a joint tenancy, permitted, for temporary reasons, for convenient handling, property to be taken and held by either of them or some agent, such property was in no wise removed from the control of the contract, and the holders were trustees for the owners as joint tenants, and upon the death of either of owners the complete equitable title and right to the entire legal title would vest in the survivor, and could be judicially enforced.—Smith v. Douglas County, Neb., U. S. C. C. A., 254 Fed. 244.

57. **Judgment**—Amending.—Courts have right to entertain motions to correct judgment and record thereof nunc pro tunc, but such motions must be founded upon some matter already in the record which must supply the means for making the corrections.—Stigleman v. Felter, Ind., 121 N. E. 670.

58.——Dormancy.—A dormant judgment is not void, but only voidable, and for that reason it cannot be attacked in a collateral proceeding.—Burlington State Bank v. Marlin Nat. Bank, Tex., 207 S. W. 954.

59.——Res Judicata.—Where a court has jurisdiction of subject-matter of action and of the parties, its orders and judgments as to all matters involved are conclusive, and such matters cannot be relitigated by parties in an original proceeding before another tribunal.—Rennolds v. Guthrie, Kan., 177 Pac. 359.

60.——Term of Court.—Court may revise any judgment, decree, or order at term at which it was rendered.—Gulf, C. & S. F. Ry. Co. v. Muse, Tex., 207 S. W. 897.

61. **Larceny**—Variance.—Under an indictment for the larceny of "one seven-passenger automobile Overland" of a certain model and number, on proof that it was a "Willys-Overland" of the same number and model as that alleged, there was no variance amounting to a failure of the evidence to sustain the charge.—Stewart v. State, Ga., 7 S. E. 871.

62. **Master and Servant**—Invitee.—If plaintiff's intestate, who was an invitee in defendant's restaurant, was wrongfully killed by defendant's servant while the servant was acting in the scope of his employment, defendant was liable.—E. I. Du Pont de Nemours & Co. v. Snead's Adm'r, Va., 97 S. E. 812.

63.——Obvious Danger.—Duty of supervision and superintendence does not exist where the danger is known to the injured servant or is so open and obvious that he is presumed to have had knowledge of it.—Swift & Co. v. Hatton, Va., 97 S. E. 788.

64.——Master's Duty.—An employe cannot recover for personal injuries caused by risks from the master's negligence or failure to discharge his masterial duties, where he has assumed them.—Taylor v. Chicago, R. I. & P. Ry. Co., Iowa, 170 N. W. 388.

65. **Mortgages**—Parol Evidence.—A conveyance of realty in the form of an absolute fee-simple deed can be shown by parol evidence to be only a security deed, where the grantor, after making the deed, retains possession of the realty conveyed.—Farmers' Supply Co. v. Smith, Ga., 97 S. E. 864.

66.——Pre-existing Debt.—A conveyance of real estate by mortgage or deed of trust can only be effective as such when made to secure a pre-existing, then created, or after arising ob-

ligation, or the performance of some duty entailing a pecuniary liability.—Finnerty v. John S. Blake & Bro. Realty Co., Mo., 207 S. W. 772.

67.——Tenancy by Sufferance.—Where mortgagor remained in possession of land after sale upon execution under mortgaged foreclosure, retaining possession and harvesting a crop after sheriff's deed was delivered to the mortgagee as execution purchaser, he was a tenant by sufferance and was the owner of the severed crop. —Power Mercantile Co. v. Moore Mercantile Co., Mont., 177 Pac. 406.

68. **Municipal Corporations** — Delegated Power.—Municipal corporations can exercise only such powers as are delegated to it by the Legislature.—Incorporated Town of Decatur v. Gould, Iowa, 170 N. W. 449.

69.——Easement in Street.—City cannot acquire prescriptive right to easement in land for street purposes, unless public travel has pursued a definite, fixed course over it for the statutory period.—Barnard Realty Co. v. City of Butte, Mont., 177 Pac. 402.

70.——Ministerial Function.—A purely ministerial function of a municipal officer is one as to which nothing is left to discretion, while legislative acts involve the exercise of discretion and judgment.—Lotspech v. Mayor and Aldermen of Town of Morristown, Tenn., 207 S. W. 719.

71. **Negligence**—Degrees of.—As a matter of law there can be no degrees of negligence, and hence no degrees of duty.—Union Traction Co. of Indana v. Berry, Ind., 121 N. E. 655.

72.——Wantonness.—An act committed in such manner that a person of ordinary reason and prudence would say that it was a reckless disregard of another's rights is "wanton," although the wrongdoer does not actually realize that he is invading the rights of another.—Norris v. Greenville, S. & A. Ry. Co., S. C., 97 S. E. 848.

73. **Parent and Child**—Respondeat Superior.—Where the owner of an automobile has purchased it for the use and pleasure of his family, he is chargeable with the negligence of a minor member of his family who has been given permission to use the automobile.—Collinson v. Cutter, Iowa, 170 N. W. 420.

74. **Payment**—Application of.—At time of payment the debtor may direct to what items of account the payment shall be applied, and if he fails to do so his creditor may apply the payment, but only to debts then due, and not to advances not yet made.—Petroutsa v. H. C. Schrader Co., Fla., 80 So. 486.

75. **Process** — Substituted Service. — Where publication is substituted for summons, the proceedings required by statute must be strictly followed.—Ponder v. Martin, Miss., 80 So. 388.

76. **Railroads**—Crossing.—One crossing railroad tracks guarded by gate may assume way is safe so far as gate is concerned until warned to contrary by gong or other device or by seeing gate descend, and may assume it will not be lowered while he is passing through; his duty being exercise of ordinary care.—Atlantic Coast Line R. Co. v. Ballard, Ala., 80 So. 436.

77.——Initial Carrier.—Where railroad delivered car with insecurely fastened door to shipper and after loading of car by shipper delivered car to connecting carrier, the initial carrier was liable for injuries to consignee's employe, because of such defective door.—Sasnowski v. Mobile & O. R. Co., Mo., 207 S. W. 865.

78.——Negligence per se.—Violation of speed ordinance is negligence per se.—Michigan Cent. R. Co. v. Kosmowski, Ind., 121 N. E. 665.

79. **Receivers**—Adverse Claims.—While a receiver has no authority to question orders and decrees distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon discretion of court appointing him, he may defend the estate in his possession against all claims which are antagonistic to the rights of both parties to suit.—Wiley Fertilizer Co. v. Carroll, Ala., 80 So. 417.

80. **Release**—Mistake of Fact.—A mistake of fact, to constitute the basis of rescission of settlement of a claim for personal injuries, must relate to some present or past event.—Malloy v. Chicago Great Western R. Co., Iowa, 170 N. W. 481.

81. **Sales**—Completed Sale.—Where goods are in existence, the quantity ascertained, the price fixed, and a part thereof paid, sale may be complete, though manual or physical delivery of property is postponed to later date, to be designated by buyer.—Moats v. Strange Bros. Hide Co., Iowa, 170 N. W. 456.

82.——Deceit.—The difference between a warranty and a fraudulent representation is that the latter contains the element of deceit, whereas that element is not essential to the former. —Barthelemy v. Foley Elevator Co., Minn., 170 N. W. 513.

83.——Unloading and Inspection.—A purchaser of lumber in carload lots has the right to rely upon the obligation resting on the seller under his contract to ship the commodity of the character and quality specified, and is entitled to a reasonable time in which to unload the car and make inspection or examination before he is required to accept.—Rosenbaum Hardware Co. v. Paxton Lumber Co., Va., 97 S. E. 784.

84. **Statutes**—Prospective Operation.—Unless there is a clear intent to the contrary, statutes are presumed to be prospective only in their operation.—Nickels v. Nichols, Me., 105 Atl. 386.

85. **Trespass**—Force.—Any entry on land of another without express or implied authority is a trespass to such realty, degree of force being immaterial, some force being implied from any unlawful entry, as every man's land is surrounded at least by an ideal boundary.—Foust v. Kinney, Ala., 80 So. 474.

86. **Vendor and Purchaser**—Option.—An "option" is neither a sale nor an agreement to sell, but a contract by which owner of property agrees that another will have a right to buy that property for a fixed consideration within a prescribed time.—Lauderdale Power Co. v. Perry, Ala., 80 So. 476.

87.——Vendor's Lien.—Purchase-money notes are secured by an equitable vendor's lien, though there is no express reservation of a lien either in notes themselves or in deed.—Luse v. Rea, Tex., 207 S. W. 942.

88.——Waiver.—Where a land contract provided that the sale might be declared void if the first note with interest were not paid on a fixed date, and the grantee refused to accept the payment, he waived his right to payment on such date.—Eason v. Fowler, Tex., 207 S. W. 958.

89. **Waters and Water Courses**—Meander Line.—Where original boundary followed lake meander line and waters receded imperceptibly, the water's edge was the boundary.—Chew v. De Ware, Tex., 207 S. W. 988.

90. **Wills**—Determinate Interest.—Where testator bequeathed to his wife, so long as she remained his widow, his entire property, with power to sell and convey any realty in fee, she took only an estate for life, subject to termination on remarriage, though there was no limitation over, and, where she died without having remarried, the realty devised to her passed to testator's next of kin as an estate of remainder in fee simple.—Fetter v. Rettig, Ohio, 121 N. E. 696.

91.——General Legacy.—A general legacy of a certain amount of money cannot be paid out of proceeds from undevised real estate, unless there is an intention to do so expressly declared or clearly inferred from the language of the will. —Ford v. Cottrell, Tenn., 207 S. W. 734.

92.——Intestacy.—A construction of a will, resulting in total or partial intestacy, will be avoided, wherever it can reasonably be done.— Fodersen v. Matthiesen, Iowa, 170 N. W. 385.

93.——Undue Influence.—On contest of a will for undue influence, contestant is required, in first instance, to assume full burden of proof of allegation.—Sanford v. Holland, Mo., 207 S. W. 818.